STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DARRYL BELL,

Defendant-Appellant.

UNPUBLISHED
August 5, 1997

No. 187997
Recorder's Court
LC No. 93-004064

Before: Young, P.J., and Gribbs and S. J. Latreille*, JJ.

PER CURIAM.

Defendant was convicted by a jury of possession with intent to deliver 650 or more grams of cocaine, MCL 333.7401(2)(a)(i); MSA 14.15(7401)(2)(a)(i), conspiracy to commit that offense, MCL 750.157a; MSA 28.354(1), and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He was sentenced to concurrent terms of life imprisonment without parole for the possession with intent to deliver and conspiracy convictions, to be served consecutive to two years' of imprisonment for the felony-firearm conviction. Defendant appeals as of right. We affirm.

I.

Defendant initially challenges the trial court's instructions to the jury. Defendant first argues that he was denied a fair trial when the court failed to instruct the jury regarding "what possession meant." The trial court offered to give an instruction which comported with the caselaw. However, defendant objected to that instruction and agreed that no instruction defining possession be given. Defendant may not assign error on appeal to something that his own counsel deemed proper at trial. *People v Barclay*, 208 Mich App 670, 673; 528 NW2d 842 (1995). In any event, the jury was instructed that a conviction required a finding that defendant not only possessed cocaine, but also knew that the substance he possessed was cocaine. We reject defendant's claim that the jury may have found that defendant was in possession of the cocaine simply because he was in possession of the van.

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* Circuit judge, sitting on the Court of Appeals by assignment.

Defendant also claims that the trial court erred in failing to instruct, sua sponte, on the lesser included offenses of possession of 650 or more grams of cocaine and conspiracy to commit the same offense. We disagree. In a prosecution for delivery of 650 or more grams of cocaine, the trial court is not obliged to sua sponte give an instruction on simple possession. *People v Binder (On Remand)*, 215 Mich App 30, 36; 544 NW2d 714, vacated in part on other grounds, 453 Mich 913 (1996). We see no principled basis for distinguishing this case on the ground that defendant was convicted of possession with intent to deliver instead of delivery. Therefore, defendant is not entitled to relief on this issue.

II.

Next, defendant argues that the trial court abused its discretion by allowing the prosecutor to introduce evidence that, several weeks before defendant's arrest, one of his accomplices was detained at the Cincinnati Airport and had $112,000 confiscated from him. We review this claim for an abuse of discretion. *People v McAlister*, 203 Mich App 495, 505; 513 NW2d 431 (1994). In *People v Hubbard*, 209 Mich App 234; 530 NW2d 130 (1995), this Court reviewed a trial court's decision to admit testimony of drug courier profiles. The Court characterized such evidence as "suspect," and inadmissible as substantive evidence of the defendant's guilt. The Court noted, however, that "many jurisdictions allow admission of drug profile evidence for limited purposes such as to explain why a defendant was stopped or to rebut exculpatory testimony by a defendant." *Id*. at 241-242. The evidence in this case was admitted following the prosecutor's motion in limine, where he argued that it was presented to explain why the police conducted their surveillance of Diaz' room. Thus, the evidence was relevant for this purpose, and that relevancy was not outweighed by the prejudicial effect, especially in light of the fact that defendant did not request a limiting instruction. We find no abuse of discretion in the trial court's decision.

III.

Next, defendant argues that the prosecutor engaged in several instances of misconduct which warrant reversal of defendant's conviction. Since defendant failed to object to this alleged misconduct at trial, appellate review is precluded unless a cautionary instruction could not have cured the prejudicial effect, or unless failure to review the issue would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994); *People v Lee*, 212 Mich App 228, 245; 537 NW2d 233 (1995). Upon review of the record, we conclude that the prosecutor's conduct did not exceed the scope of prosecutorial responsibility. No miscarriage of justice would result from our refusal to review the issue. Moreover, any alleged prejudice was cured by the trial court's instruction that the arguments of counsel were not evidence. *People v Ullah*, 216 Mich App 669; 683; 550 NW2d 568 (1995).

In a related argument, defendant claims that the prosecutor did not refer defendant's case to federal court, where there is no mandatory life sentence, and that the failure to do so demonstrates vindictiveness because defendant's accomplices were allowed to plea bargain in federal court. We disagree. Defendant's accomplices were allowed to plea bargain in federal court because they agreed to cooperate in other investigations. Defendant acknowledges that he was not in a position to do so.

As defendant has provided no additional evidence of vindictiveness, he is not entitled to relief on this basis. *People v Watts*, 149 Mich App 502, 511; 386 NW2d 565 (1986).

IV.

Next, defendant argues that he was denied the effective assistance of counsel when his attorney failed to object to the introduction of drug courier profile evidence, failed to object to testimony describing the cocaine seized from defendant, and failed to object to prosecutorial misconduct. We disagree. To establish that counsel's assistance was so defective as to require reversal, defendant must establish: (1) that counsel's performance was deficient, i.e., that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment; and (2) that the deficient performance prejudiced the defense, i.e., that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable, and may have affected the outcome. *People v LaVearn*, 448 Mich 207, 213; 528 NW2d 721 (1995).

The drug courier profile evidence was offered for the purpose of explaining why defendant was investigated and to rebut defendant's exculpatory testimony. Therefore, this evidence was admissible. *Hubbard*, *supra* at 242. Furthermore, the testimony concerning the amount and street value of the cocaine seized from defendant was relevant as evidence of intent and, therefore, admissible. *People v Ward*, 133 Mich App 344, 356; 351 NW2d 208 (1984). As such, defendant was not prejudiced by his attorney's failure to object to this evidence.

With respect to the description of how much crack cocaine could be manufactured from the powdered cocaine seized from defendant, we find that, even assuming that such evidence was inadmissible, the failure to object did not undermine defendant's theory of defense, nor was it the result of poor trial preparation or planning. Therefore, counsel's conduct was not deficient on this basis.[1]

Defendant also claims that his attorney was deficient because he failed to object to the instances of alleged prosecutorial misconduct. However, because none of the prosecutor's conduct was improper, defendant was not prejudiced by his attorney's failure to object, and cannot establish an ineffective assistance claim on this basis.

V.

Defendant next challenges the trial court's denial of his motion to suppress his oral statements to police. This is a question of law which re review de novo on appeal. *People v Nance*, 214 Mich App 257, 258; 542 NW2d 358 (1995). At the hearing on this matter, defendant denied making the statement Cardoza attributed to him, and the trial court ruled that given this testimony, defendant could not prevail on his claim that his statement was involuntary. This ruling was correct. Where a defendant denies that he made a statement and does not claim that any statements attributed to him were involuntary, the trial court need not hold a *Walker*[2] hearing. *People v Spivey*, 109 Mich App 36, 37; 310 NW2d 807 (1981). *People v Neal*, 182 Mich App 368; 451 NW2d 639 (1990), is distinguishable because the defendant in *Neal* claimed that he involuntarily signed a statement and that

the statement was fabricated by the police. *Id.* at 371. Thus, once defendant in this case denied making the statement the police attributed to him, he was no longer entitled to a *Walker* hearing.

VI.

Defendant challenges the trial court's decision to deny his motion to suppress the evidence seized following his arrest. Specifically, defendant argues that the police used the violation of traffic laws as a pretext to stop him to investigate other crimes. In addition, defendant argues that once he was stopped, the police did not have reasonable suspicion to justify the patdown search which led to his arrest and to the search of his vehicle. We disagree.

With respect to the traffic stop, the Fourth Amendment does not prohibit the police from stopping a motorist if they have probable cause to believe that the motorist committed a traffic infraction, even if the stop is a pretext to investigate other offenses. *Whren v United States*, ___ US ___; 116 S Ct 1769; 135 L Ed 2d 89 (1996). Therefore, defendant cannot prevail on this basis.

With respect to the patdown search, such a search is permissible for the limited purpose of discovering weapons so long as the officer has reasonable suspicion of possible criminal activity and reasonable fear for his own or others' safety. To establish reasonable suspicion, the officer must be able to articulate specific facts that, taken together with rational inferences from those facts, reasonably warrant the intrusion. This is an objective standard that essentially involves a determination whether a reasonably prudent person in the particular circumstances would be warranted in the belief that his safety or the safety of others was in danger. *People v Muro*, 197 Mich App 745, 747; 496 NW2d 401 (1993).

The evidence at the suppression hearing indicated the following: When Officer Cardoza pulled defendant over, he was aware of the information obtained by the surveillance team, i.e., that defendant visited Diaz at the motel on two previous occasions, that Diaz had been connected with illegal drug trafficking in the past, and that Diaz' vehicle was from a Chicago rental company but was not listed as rented. Diaz attempted to prevent Cardoza from pulling defendant over by tailgating defendant's vehicle on the highway. Finally, before Cardoza conducted the patdown, he discovered that defendant had two previous convictions for narcotics trafficking, and that defendant was not authorized to drive the out-of-state rental car he was driving. In this context, Cardoza's suspicion of possible criminal activity and fear for his own safety was reasonable. Therefore, the patdown was legal, as was defendant's subsequent arrest when the patdown revealed a concealed weapon. Therefore, the evidence obtained in the subsequent search of defendant's vehicle was admissible.

VII.

Defendant argues that he was denied an impartial jury trial because the jury selection system in the Wayne Circuit Court systematically excludes African-Americans from jury venires. We disagree. A criminal defendant is entitled to an impartial jury drawn from a fair cross section of the community. *People v Hubbard*, (Aft Rem), 217 Mich App 459, 472; 552 NW2d 493 (1996). While the fair-cross-section requirement does not entitle the defendant to a petite jury that mirrors the community and

reflects the various distinctive groups in the population, it guarantees an opportunity for a representative jury by requiring that venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to constitute a fair cross section of the community. *Id.*. at 472-473. To establish a prima facie violation of the fair-cross-section requirement, the defendant must show "(1) that the group alleged to be excluded is a 'distinctive' group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process." *Duren v Missouri*, 439 US 357, 364; 99 S Ct 664; 58 L Ed 2d 579 (1979); *Hubbard, supra* at 473.[3] We review a trial court's decision on such a claim de novo. *Hubbard, supra* at 472.

In the present case, the trial court found that defendant established the first two elements of a prima facie fair-cross-section violation, but not the third. This conclusion was based on the testimony of the court's Jury Services Supervisor, James McCree. McCree testified that under the court's current jury selection system, fewer African-Americans appeared on jury venires than under the court's earlier system. Under the current system, jury summons are sent out randomly from the pool of potential jurors who return jury questionnaires. The former system, on the other hand, ensured that the number of summons sent to a particular city was proportionate to that city's share of the county population. The new system resulted in fewer African-Americans on jury venires because the questionnaires sent to Detroit residents "do not come back for various reasons in proportion of the Detroit population."

We agree with the trial court that this evidence does not establish that African-Americans are systematically excluded from jury venires. For example, *People v Guy*, 121 Mich App 592; 329 NW2d 435 (1982), involved a jury system in which potential jurors were selected from lists of registered voters. The system resulted in African-Americans being underrepresented on jury venires. That system did not violate the fair-cross-section requirement, however, because it is permissible to systematically exclude from jury venires persons who do not register to vote, so long as race or color is not a subject of inquiry in determining the identity of those persons. *Id*. at 600. Likewise in the instance case, it is permissible to systematically exclude from jury venires persons who do not return jury questionnaires. Defendant has provided no evidence to indicate that race is a factor in determining who receives a questionnaire and, therefore, cannot establish systematic exclusion on this basis.

VIII.

Defendant next argues that he was denied an impartial jury when the prosecutor exercised his peremptory challenges to remove jurors who expressed an opinion that drugs should be legalized. We disagree. Whether a prosecutor's use of peremptory challenges denied the defendant an impartial trial is a question of law. See *People v Barker*, 179 Mich App 702, 706-707; 446 NW2d 549 (1989). Questions of law are reviewed de novo. *People v Conner*, 209 Mich App 419, 423; 531 NW2d 734 (1995).

Defendant's authority for his argument is *Witherspoon v Illinois*, 391 US 510, 522; 88 S Ct 1770; 20 L Ed 2d 776 (1968), where the Supreme Court held that a state cannot impose a death

sentence "if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." *Witherspoon*, however, involved the dismissal of prospective jurors for cause, while the present case involves the prosecutor's use of peremptory challenges. The fifth circuit found this distinction to be significant in *Jordan v Watkins*, 681 F2d 1067, 1070 (CA 5, 1982), and ruled that *Witherspoon* is "inapposite" to cases where the prosecutor used peremptory challenges to exclude jurors who opposed the death penalty. We agree, and apply this reasoning to the present case. Therefore, defendant cannot establish that he was denied an impartial jury by the prosecutor's use of peremptory challenges to remove jurors who expressed an opinion that drugs should be legalized.

IX.

Defendant challenges his life sentences on two grounds. First, defendant argues that a life sentence for possession with intent to deliver 650 or more grams of cocaine is cruel or unusual punishment under the Michigan Constitution. We disagree. Our Supreme Court has explicitly rejected this and similar arguments on numerous occasions. See *People v Fluker*, 442 Mich 891; 498 NW2d 431 (1993); See also *People v Loy-Rafuls*, 442 Mich 915; 503 NW2d 453 (1993); *People v Cancel*, 442 Mich 914; 503 NW2d 451 (1993); *People v Gavilan*, 442 Mich 902; 502 NW2d 43 (1993); *People v Lopez*, 442 Mich 889; 498 NW2d 251 (1993). Therefore, we are compelled to reject defendant's argument. *People v Sullivan*, 167 Mich App 39, 43; 421 NW2d 551 (1988). Defendant also argues that conspiracy to possess with intent to deliver over 650 grams of cocaine must be a parolable offense. Once again, our Supreme Court has explicitly rejected defendant's argument. *Lopez, supra* at 889. Therefore, we are compelled to do so as well. *Sullivan, supra* at 43.

X.

Finally, defendant claims that enforcement of Michigan's drug laws denies equal protection of the laws to African-Americans, including defendant. However, defendant provides no authority to support this argument and has, therefore, effectively abandoned the issue. *People v Piotrowski*, 211 Mich App 527, 530; 536 NW2d 293 (1995).

Affirmed.

/s/ Robert P. Young, Jr.
/s/ Roman S. Gribbs
/s/ Stanely J. Latreille

[1] Defendant relies on *People v Brockman*, unpublished opinion per curium of the Court of Appeals, issued August 31, 1992 (Docket No. 130907), in support of this proposition. An unpublished opinion of this Court is not binding precedent. MCR 7.215(C)(1).

[2] *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).

[3] Defendant maintains that once the first two prongs of the *Duren* prima facie test are met, the third part, systematic exclusion, is presumed and the burden then shifts to the prosecution "to come forward with a neutral explanation for the infringement." However, the court's statement in *Duren* that the *defendant* must show systematic exclusion reveals the fallacious nature of defendant's argument. *Id.* at 366.